**DEPARTMENT OF STATE REVENUE**

04-20140177.LOF

**Letter of Findings: 04-20140177**
**Sales and Use Tax**
**For Tax Years 2009 and 2010**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

## ISSUES

### I. Sales/Use Tax - Imposition.

**Authority**: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-2.5-13-1; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax. Ct. 1993); 45 IAC 2.2-3-3.

Taxpayer protests the Department's assessments of additional sales tax, claiming that its customers paid the tax upon registering the tangible personal property.

### II. Tax Administration - Negligence Penalty.

**Authority**: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer requests that the Department abate the negligence penalty.

## STATEMENT OF FACTS

Taxpayer is an out-of-state company doing business in Indiana. Taxpayer sells both new and used trailers, namely, tangible personal property, which includes, but is not limited to, open car trailers and aluminum truck beds to customers that reside in Indiana and/or outside of Indiana.

The Indiana Department of Revenue ("Department") performed a sales/use tax audit of Taxpayer's business records for tax years 2009 and 2010. Pursuant to the audit, the Department determined that Taxpayer conducted Indiana retail transactions (sales) but failed to collect and remit sales tax on several items it sold and delivered to Indiana residents. The Department's audit thus assessed additional sales tax, interest, and penalty.

Taxpayer protested the Department's assessment and submitted additional documents to support its protest. Upon review, the Department agreed to remove two transactions that occurred during the 2010 tax year. Taxpayer continues to protest the remainder of the assessment related to the 2009 tax year. A phone hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

### I. Sales/Use Tax - Imposition.

## DISCUSSION

Taxpayer asserts that the Department's audit erroneously imposed sales tax on two (2) transactions that occurred during the 2009 tax year. Taxpayer argues that it was not liable for the sales tax on one of the sales because the purchaser paid the tax at the Indiana Bureau of Motor Vehicles ("BMV").

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin.,

939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). A retail transaction is defined as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1 . . . or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-1-2. "A person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(a). Further, IC § 6-2.5-4-1(b) explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." The taxable retail transaction includes the amounts the customer paid to the retail merchant for the "price of the property transferred" and for the price of any services that occur prior to the transfer of the property to the purchaser, including any delivery charges. IC § 6-2.5-4-1(e). When the retail merchant has delivered the tangible personal property to an Indiana address indicated by the purchaser, the retail merchant must collect Indiana sales tax on the transaction. IC § 6-2.5-2-1(b) and IC § 6-2.5-13-1(d)(2).

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Rhoade, 774 N.E.2d at 1048; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468 - 69 (Ind. Tax. Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. Rhoade, 774 N.E.2d at 1047 - 1050 (explaining that, generally, states impose a use tax to prevent the erosion of the state's tax base when its residents make purchases in other states). To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. IC § 6-2.5-3-2(a); USAir, Inc., 623 N.E.2d at 468 - 69. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b) and (c); IC § 6-2.5-3-2(a).

IC § 6-2.5-2-1 states:

> (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
> (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. **The retail merchant shall collect the tax as agent for the state**. (**Emphasis added**).

IC § 6-2.5-3-1(c) states that:

> "A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana and who:
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> (1) maintains an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by the retail merchant or through a representative, agent, or subsidiary;
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> (2) maintains a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, installs, repairs, assembles, sets up, accepts returns of, bills, invoices, or takes orders for sales of tangible personal property or services to be used, stored, or consumed in Indiana;
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> (3) is otherwise required to register as a retail merchant under IC 6-2.5-8-1; or

(4) may be required by the state to collect tax under this article to the extent allowed under the Constitution of the United States and federal law.

45 IAC 2.2-3-3(2) further explains that:

A retail merchant engaged in business in Indiana shall include:
. . .
Any retail merchant engaged in selling at retail for use, storage, or consumption in Indiana and having any representative, agent, salesman, canvasser or solicitor operating in Indiana under the authority of the retail merchant or its subsidiary for the purpose of selling, delivering, or taking orders for the sale of any tangible personal property for use, storage, or consumption in Indiana.

Accordingly, Taxpayer in this instance is a retail merchant engaged in business in Indiana pursuant to the above mentioned Indiana law and regulation. Taxpayer, as an agent for the State of Indiana, thus is required and is responsible for collecting and remitting the Indiana sales tax on behalf of the State.

In this instance, the Department found that during the tax year 2009, Taxpayer failed to collect Indiana sales tax on two transactions in which it sold and delivered tangible personal property to its customers who reside in Indiana. The transactions at issue are as follows:

(1) August 5, 2009, in the amount of $3,000, and
(2) December 30, 2009, in the amount of $7,029.96.

Throughout the protest, Taxpayer refers to a copy of the BMV receipt, claiming that it was not liable for the Indiana sales tax on the December 30, 2009 transaction, in the amount of $7,029.96, because its customer (purchaser of the tangible personal property) paid the tax at the BMV upon registering the title. Clearly, Taxpayer makes an equitable argument that the Department should have released Taxpayer's statutory responsibility of collecting and remitting the sales tax because its customer paid the use tax as a result.

Upon review, however, even if the Department considers Taxpayer's equitable argument that tax was paid, its reliance on this documentation is misplaced. In this instance, Taxpayer's record show that it sold the item on December 30, 2009, but the BMV receipt was dated August 8, 2010. Additionally, the amount of sales tax on the December 30, 2009 transaction is $492.10, but the BMV receipt showed that only $487.90 was recorded. Taxpayer was not able to explain the discrepancies as to the dates and the deficiency of the tax paid. Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden of proof.

**FINDING**

Taxpayer's protest of the imposition of sales tax is denied.

**II. Tax Administration - Negligence Penalty.**

**DISCUSSION**

The Department's audit imposed a ten percent negligence penalty for the tax period in question. Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

(1) fails to file a return for any of the listed taxes;
(2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
(3) incurs, upon examination by the department, a deficiency that is due to negligence;
(4) fails to timely remit any tax held in trust for the state; or
(5) is required to make a payment by electronic funds transfer (as defined in IC 4-8.1-2-7), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

45 IAC 15-11-2(b) further states:

> "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
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> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
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> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In this instance, Taxpayer requested that the Department abate the negligence penalty. However, Taxpayer fails to provide any reasonable cause to support its request. Thus, the Department is not able to abate the penalty imposed concerning the 2009 sales.

**FINDING**

Taxpayer's protest of the imposition of negligence penalty is respectfully denied.

**SUMMARY**

For the reasons discussed above, Taxpayer's protest of the imposition of the sales tax and penalty for the tax year 2009 is respectfully denied.

*Posted: 10/29/2014 by Legislative Services Agency*
An html version of this document.